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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 759

HUGO V. LOEWI, INC., A CORPORATION,
Petitioner,

vs.

FRED GESCHWILL,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Hugo V. Loewi, Inc. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above case on January 31, 1951 (R. 551).

Opinions Below

The Memorandum Decision of the District Court (R. 33) is unreported. The opinion of the Circuit Court of Appeals is reported in 186 Fed. 2d 849 (R. 527).

Jurisdiction

The judgment of the Court of Appeals was entered on January 31, 1951 (R. 551). A petition for rehearing was

denied on April 18, 1951 (R. 552). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Questions Presented

1. Whether under the Uniform Sales Act a seller may maintain an action for the price where the goods tendered do not meet contract specification.

2. Whether under the Uniform Sales Act a seller may maintain an action for the price where the contract provides that in a case of breach the measure of damages shall be the difference between market price and contract price.

Statute Involved

The pertinent provisions of the Uniform Sales Act are printed in Appendix A.

Statement

This and a companion case, *Hugo V. Loewi, Inc.* v. *Smith,* involve the same important issues, the rights of buyer and seller under a standard hop sale contract. For the sake of brevity reference here will at times be made to the Petition for Certiorari filed this same day in that case.

The petitioner, Hugo V. Loewi, Inc., a New York corporation, was the buyer under a typical hop sale contract. The respondent, the seller, is an Oregon hop producer. The contract of sale was entered into on August 18, 1947 (R. 7-16). It made provision for quality (R. 8), price (R. 9), picking advances (R. 11), and measure of damages (R. 13).

On August 27, 1947 the buyer advanced $4,000 (R. 98, 85) to the seller to enable him to harvest his crop. This he did, and forwarded samples thereof to the buyer in New York (R. 100, 295). Upon their receipt the petitioner

advised his Oregon representative that the hops were blighted and not acceptable (R. 85, 373). Further samples were taken (R. 296, 297, 347), and the seller notified that the hops were not of contract quality (R. 373). Formal rejection was made on October 30, 1947 (R. 85).

Upon rejection the seller commenced this action for the contract price in the Circuit Court of the State of Oregon (R. 2, 7, 16). The action was removed to the United States District Court for the District of Oregon (R. 20, 21). Resale was permitted by the stipulation of the parties after this action was commenced (R. 127, 128, 132, 413). The price brought on resale was approximately one-fourth of the contract price (R. 41).

The contract involved hops

> "not affected by spraying or mold, but of prime quality in sound condition, of good color, fully matured, cleanly picked, free from damage by vermin, properly dried, cured and baled, and in good order and condition." (R. 8)

The trial court did not find the hops of prime quality. Nor did it find the hops unaffected by mold (R. 35-41). It found instead that the hops were "merchantable" (R. 39). It found, too, that the hops as delivered were no more blighted or mildewed than when the buyer contracted to purchase or when it elected to make its advance (R. 39).

The contract also provided

> "that upon the breach of the terms of this contract by either party, the difference between the contract price of said hops and the market value thereof at the time and place of delivery shall be considered and is hereby agreed to be the measure of damages." (R. 13).

The trial court held that under Oregon law, the measure of plaintiff's recovery was the amount due under the contract, less, of course, the advance payment (R. 42).

On appeal, the court below affirmed the judgment of the District Court, emphasizing that the picking advance was made with the buyer's knowledge that the hop crop showed some mildew.

While the appeal in the instant case was pending, *Steiner* v. *Hill*, 52 Or. Adv. 57, 226 Pac. 2d 307 (Jan. 17, 1951) was decided in the Supreme Court of the State of Oregon. There, as here, the dispute involved the standard hop sale contract. There, too, the hops were mildewed and blighted. The buyer instituted action to recover its picking advance. The seller counterclaimed for the price on the theory that the plaintiff by making advances with the knowledge that the hops on the vine showed mildew waived contract specifications concerning quality. The Oregon Supreme Court held, however, that the seller could not maintain his counterclaim for price. Judgment was entered for the buyer.

The buyer in the instant case petitioned the Court of Appeals for a rehearing. It was denied on April 1, 1951, Judge Pope dissenting (R. 552).

Meanwhile, the seller in the *Steiner* case petitioned the Supreme Court of the State of Oregon for a rehearing on the basis of the decision in the court below. This was denied on April 25, 1951.

The parties to this action, by the terms of the contract, provided that in case of breach by either party the remedy of the aggrieved party was an action for damages for the difference between market and contract price (R. 13). The trial court permitted recovery of the price. The court below sustained this recovery on the theory that the contractual measure of damages was not the exclusive remedy available to the seller.

Specification of Errors to Be Urged

The Court of Appeal erred:

1. In holding that under the Uniform Sales Act a seller may maintain an action for the contract price where the goods tendered do not meet contract specification;

2. In holding that under the Uniform Sales Act a seller may maintain an action for the price where the contract provides in case of breach the measure of damages should be the difference between the market price and contract price;

3. In applying the doctrine of substantial performance to a contract for the sale of goods;

4. In affirming the judgment of the District Court.

Reasons for Granting the Writ

1. The decision of the Court of Appeals is in direct conflict with the recent decision of the Supreme Court of Oregon in *Steiner* v. *Hill,* 52 Or. Adv. 57, 226 Pac. 2d 307 (Jan. 17, 1951), rehearing denied April 25, 1951.

In the *Steiner* case the seller tendered hops which were mildewed and blighted. Hops mildewed and blighted were tendered in the instant case (R. 39). Both contracts call for hops not affected by mold, and are alike in all material respects. In the one case the Supreme Court of Oregon denied recovery because the hops were mildewed. In the other, the Court of Appeals has permitted recovery of the contract price on the theory that the tender of mildewed hops constituted substantial performance of the contract. Upon the fundamental principle involved, the two courts are in irreconcilable conflict.

2. The decision of the Court of Appeals is in direct conflict with that of the Supreme Court of Oregon in *Daniels* v. *Morris,* 65 Or. 289, 130 Pac. 397, 132 Pac. 958.

The question there involved was the measure of damages. The contract provided that it should be the difference between the contract price and the market value of the kind and quality of the hops specified by the contract. The court limited the seller to this amount. In this case, too, the measure of damage provided is the difference between the contract price and the market price. The court below permitted recovery of the contract price.

3. The doctrine that a contract for the sale of goods of certain specifications can be satisfied by the tender of goods which do not meet the specifications but which the court holds substantially conform to these specifications, and the doctrine that the remedy of either party in the event of breach fixed specifically by the terms of the contract is not exclusive, are revolutionary.

4. The hop growing industry constitutes a major segment of the economy of the Pacific Coast, particularly of the States of Oregon and Washington. The farmers who raise crops are for the most part unable to finance the planting, growing and harvesting of the crops. The dealers advance tremendous sums to the growers for that purpose and enter into contracts for the purchase of crops when finally harvested.

The type of contract in general use, such as the one involved in the instant case, covers every conceivable situation which knowledge and experience can foresee. Its purpose is to fix the rights and remedies of the parties in all circumstances. The decision of the Court of Appeals has created uncertainty where none previously existed. This is harmful to both seller and buyer. The conflict between the Supreme Court of Oregon and the Court of Appeals should be corrected.

Argument

The petitioner respectfully refers to the argument submitted this day in support of the petition for writ of certiorari in *Hugo V. Loewi, Inc.* v. *Kilian W. Smith.*

Conclusion

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

ARTHUR B. HYMAN,
Counsel for Petitioner.

KERR & HILL,
Of Counsel.

APPENDIX A

Section 71 of the Uniform Sales Act, Section 71-171, O.C.L.A.:

> "Where any right, duty or liability would arise under a contract to sell or a sale by implication or law, it may be negatived or varied by express agreement or by a course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale."

Section 64 of the Uniform Sales Act, Section 71-164, O.C.L.A.:

> "(3) Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept."

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IN THE

Supreme Court of the United States

October Term, 1950

No. 759

HUGO V. LOEWI, INC., a Corporation,

Petitioner,

vs.

FRED GESCHWILL.

On Petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum of decision (R. 33) and the findings of fact and conclusions of law (R. 34-42) by the District Court are not reported. The opinion of the Court of Appeals (R. 527-550) is reported in 186 F. 2d 849, and on denial of rehearing (R. 552) in 188 F. 2d 366.

The opinions in the two companion cases that were tried and appealed with this case on a consoli-

dated record are also material here: *Hugo v. Loewi, Inc., v. Smith,* 186 F. 2d 858, rehearing denied 188 F. 2d 160 (petition for writ of certiorari, No. 760); and *John I. Haas, Inc., v. Wellman,* 186 F. 2d 862 (no petition for writ of certiorari).

JURISDICTION

The judgment of the Court of Appeals was entered January 31, 1951 (R. 551). A petition for rehearing was denied on April 18, 1951 (R. 552). The petition for a writ of certiorari was filed May 25, 1951. The jurisdiction of this Court is invoked under Title 28, U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court's findings of fact that the hop grower duly performed the contract (including tender of hops meeting the contract specifications), which are supported by substantial evidence, should be reviewed by this Court.

2. Whether the decisions of the two lower courts conflict with a recent opinion of the Oregon Supreme Court on a matter of local law, where the Oregon court in a later opinion has expressly recognized that there is no such conflict.

3. Whether upon the contract and the facts the correct measure of recovery was allowed under Oregon law.

STATUTES INVOLVED

The pertinent provisions of the Oregon statutes on the merits of the case, in addition to those cited by petitioner, are printed in Appendix A to this brief.

STATEMENT

During harvest season in 1947 petitioner hop buyer contracted for the purchase of the entire crops of fuggle and late cluster hops produced by plaintiff hop grower on his farm in Marion County, Oregon (R. 35-36, 7-16). The buyer paid for the fuggle crop, and it is not in dispute here (R. 36). There was a decline in the hop market (R. 40). The buyer purported to reject the crop of late cluster hops, claiming a deficiency in quality because of "mildew" (R. 39). The trial court found that the claimed defect was not material (R. 39), and that the grower duly performed the contract on his part (R. 37).

The contract was recorded by petitioner as a chattel mortgage to secure the advance payment made at harvest time (R. 36). After the action was commenced petitioner as such mortgagee permitted the resale of the hops upon certain stipulated conditions (R. 40). The District Court allowed the grower a recovery measured by the difference between the contract price and the total received by him from the advance payment and the resale proceeds (R. 38, 40-41).

The determinative facts appear in the trial court's findings (R. 34-41) and in the opinions of the Court of Appeals, cited above. Those facts are not fully reiterated here. The following are particular matters which we believe are inadequately or inaccurately described in petitioner's statement.

1. Both parties waived jury trial, and the issues were tried by the court. On trial it appeared that this action and the two companion cases (cited above) involved common questions of law and fact. Accordingly the parties consented and the District Court ordered that the three actions be tried jointly and that the evidence in each would be deemed to have been taken and would be considered in the others, to the extent material. (R. 34-35, 504.) The three cases were considered by the Court of Appeals on a consolidated record (R. 63, 513-514, 515-518, 527-528). The large number of documentary exhibits were considered by the appellate court in their original form, without being printed (R. 62, 512-513). The testimony printed in one case was considered, but not reprinted, in the others (R. 516, 518).

2. The basic theory throughout the petition is that the evidence and findings show something materially less than due compliance with the quality provisions of the contract.

Petitioner assumes an "admitted fact" that the hop crop was affected by "mold."[1] This is not admitted, and the record shows it is not the fact (R. 172-173).[2] "Mold" is specifically mentioned in the contractual warranty, while "mildew" is not (R. 8).

The evidence on "mildew" relates to the factual issue as to whether the hops were of "prime quality," another trade term used in the contract (R. 8). Thus, petitioner's president testified that the claimed deficiency in quality resulted from "blight," meaning "mildew" (R. 433, 464-465), and that if the hops had been free of mildew "they would have been a good, prime hop" (R. 438).

The District Court's findings on the quality issue, resolving such conflicts in the evidence, may be condensed as follows: The grower duly performed all of the terms and conditions of the agreement between the parties on his part to be performed

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1. Petition 3, 7, incorporating argument by reference from petition in No. 760, p. 7.

2. "Mold," as the term is used in the trade, is a black, sticky condition of the hop caused by the hop aphid, i.e., the hop louse (R. 78-81).

"Mildew" is a fungus brought on by rainy weather, and, depending on how late in the growing stage it develops, may stunt the vine so that no hops are produced; or it may stunt the cones so that they are small nubbins, which like stems and leaves are extraneous matter in the baled hops; or it may cause a reddish color on parts of the petals without affecting the lupulin (R. 79-83, 145, 369, 459, 481).

One witness for petitioner testified that *botanically* downy mildew could *roughly* be considered a type of mold or mildew (R. 370). By this apparently he meant that mildew is a fungus, i.e., any of a group of plants comprising the molds, mildews, rusts, smuts, etc. (Webster's New International Dict., 2d Ed.)

The trade terms used in the contract should not under Oregon law be given meanings different from those understood by the parties (p. 8, below).

(R. 37).[3] The grower did everything he was bound to do for the purpose of putting the specific crop of cluster hops in a deliverable state and delivered the same in warehouse (R. 37). The buyer knew that there was widespread mildew in the Willamette Valley hop yards that year, and the buyer knew of the mildew in this crop before contracting to buy the same and before making the advance payment (R. 36-37, 39). The buyer refused to pay for said hop crop on the ground that said hops were "blighted" (*i.e.*, showed some mildew effect) and on no other specific ground (R. 39). Upon the facts the claimed defect was not material (R. 39).

The Court of Appeals was "of the opinion that the finding by the trial court that the mildew damage or blight was not material is supported by substantial evidence" (R. 539).

3. While these companion cases were before the Court of Appeals, the Oregon Supreme Court handed down its first opinion in another hop case:

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3. Petitioner apparently bases its argument as to the matter of quality on the terms "substantially conformed" and "merchantable" used elsewhere in the District Court's findings (R. 39, 40). The use of those terms can best be understood against the background of local law:

"Of course a slight unsubstantial variance in quality would not relieve the purchaser from payment, . . ." *Naftzger v. Henneman*, 94 Or. 109, 118, 185 Pac. 233, 236.

In *Wolf v. Edmundson*, 240 Fed. 53, 59, Judge Wolverton, who previously had served eleven years on the Oregon Supreme Court, instructed the jury: ". . . in considering the quality of these hops, you will consider them as merchantable, as the parties themselves desired that the hops should be sold in the market and should be so treated, . . ." On appeal the Court said that the instructions properly submitted to the jury "the real question of fact," *i.e.*, "the merchantable quality of the hops according to the custom of the hop trade."

Steiner, Inc. v. Hill, 52 Or. Adv. Sh. 57, 226 P. 2d 307. The Court of Appeals distinguished the state court case upon the ground that it, unlike these cases, turned upon the pleading and proof of waiver or estoppel, and also upon the ground that there were material differences in the facts (No. 760 R. 373-374, 186 F. 2d at 861). The petition, however, states (p. 5) that the decision of the Court of Appeals here is in direct conflict with the state court decision.

In its opinion on rehearing in *Steiner, Inc. v. Hill*, 52 Or. Adv. Sh. 745, 230 P. 2d 537, the Oregon court expressly recognized that there was no such conflict, and adopted the distinction made by the Court of Appeals. The Oregon court said (52 Or. Adv. Sh. at 750-751, 230 P. 2d at 540):

> "We have examined and considered the opinions in the following cases rendered on January 31, 1951, by the United States Court of Appeals for the Ninth Circuit; *Hugo V. Loewi, Inc. v. Geschwill*, 186 F. 2d 849; *Hugo V. Loewi, Inc. v. Smith*, 186 F. 2d 858; and *John I. Haas, Inc. v. Wellman*, 186 F. 2d 862. These constitute a series of cases all involving contracts for the purchase and sale of hops grown in the Willamette Valley in the year 1947. Although these cases are common to the case at bar in that they involved hop contracts for the purchase and sale of hops and wherein the question of 'mildew' was an issue, they are unlike the one before us in that in none of them did the grower concede a quality defect, as here, and plead waiver or estoppel as a defense. In the *Hugo V. Loewi*,

Inc. v. Smith case, our first opinion was cited to the court, where it was reviewed and disposed of by Judge Bone with the observation:

" 'It is our view, and apparently the view of the appellant, that there was no finding of waiver or estoppel by the trial court in the instant case. Therefore, the cited case is not germane to any issue before us * * *.'

"Beyond that, neither waiver nor estoppel is discussed in any of these recent federal cases, and they are of no aid here."

ARGUMENT

(In answer to petitioner's argument in the companion case, No. 760, which is incorporated by reference into the petition in this case.)

I

The factual issue concerning the quality of the hops is no longer open. It was resolved by the District Court's findings, upon substantial evidence, that the hops conformed to the contract.

The issue was factual, not legal. The contractual warranty is composed of various trade terms which under Oregon law, and generally, are to be given the meanings which the evidence shows are accorded them by the practices of the trade and of the parties.[4] The Oregon decisional law is well-established, in cases such as this, that the quality of hops and their conformance to the contract are factual matters

4. §§2-218 and 2-219, Or. Comp. L. Ann.; *Hurst v. Lake & Co., Inc.*, 141 Or. 306, 317, 16 P. 2d 627, 631; Corbin on Contracts, §555; Restatement of Contracts, §246 and Ill. 7, §248 and Ill. 5; Wigmore on Evidence, 3d Ed., §2460; Williston on Contracts, Rev. Ed., §650.

to be determined in the trial court. *Seidenberg v. Tautfest,* 155 Or. 420, 426, 64 P. 2d 534, 536; *Daniels v. Morris,* 65 Or. 289, 294-295, 130 Pac. 397, 399, 132 Pac. 958.

Petitioner's argument is founded upon three assumptions: (1) That the hops showed "mold"; (2) that the claimed defect was material; and, (3) that there is a conflict between the decision of the Court of Appeals here and the decision of the state court in *Steiner, Inc. v. Hill, supra.* The error of those assumptions sufficiently appears, we believe, from the foregoing Statement, without the addition of argument.[5]

We submit that the factual issue on quality is not now subject to redetermination—that the trial court's findings, based upon substantial evidence, finally resolved the issue. Rule 52, Federal Rules of Civil Procedure;[6] *United States v. Yellow Cab Co.,* 338 U.S. 338, 341.

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5. Petitioner cites *Filley v. Pope,* 115 U.S. 213, and *Norrington v. Wright,* 115 U.S. 188, for the proposition that, in a mercantile contract, a statement descriptive of the subject matter is ordinarily to be regarded as a warranty, requiring full compliance. Here, as the trial court found, the grower duly performed. In addition, the buyer could not defend upon the ground of a claimed breach of warranty because it did not in fact rely upon any warranty that the hops would be any different in condition or quality than they actually were when tendered and delivered (R. 39; and also memorandum of decision, R. 33). Reliance is the essence of warranty. §71-112, Or. Comp. L. Ann.; *Abilene Nat. Bank v. Nodine,* 26 Or. 53, 54, 37 Pac. 47.

6. "* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *"

II

The measure of recovery allowed was proper under Oregon law.

Petitioner's argument concerning the measure of recovery is based on the factual assumption that the claimed defect in quality was material.[7] The error of such assumption is discussed above, and that matter need not be repeated here.

The relief allowed was measured by the difference between the contract price and the total received by the grower from the advance payment and the resale proceeds. The same result would be reached by any one of several legal theories applied to these facts.

Thus, since the property in the goods had passed to the buyer, as the trial court concluded, an action for the balance of the price would lie under §71-163(1), Or. Comp. L. Ann. In both the lower courts petitioner argued that its refusal to accept the hop crop, even though the crop upon tender and delivery was of contractual quality and the refusal was wrongful, would prevent the property in the goods from passing. The law, we submit, is to the contrary.[8]

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7. Page 8 of petition in No. 760, adopted by reference into petition here (p. 7).

8. *Brigham v. Hibbard*, 28 Or. 386, 387-388, 43 Pac. 383; *Delaware, Lackawanna & Western R.R. Co. v. United States*, 231 U.S. 363, 371-372; *Henry Glass & Co. v. Misroch*, 239 N.Y. 475, 147 N.E. 71, 73; *Lehman v. Salzgeber*, 124 Fed. 479; Williston on Contracts, Rev. Ed., §1364.

The Court of Appeals held that the District Court's conclusions of law on this issue were correct (No. 760 R. 378).[9]

In addition, the Court of Appeals demonstrated that, even if title had not passed, upon the facts here the measure of recovery would be the same (R. 540-547).

The hops could not readily be resold (R. 40); there had been a material decline in price and demand for Oregon cluster hops (R. 40); the buyer had recorded the contract as a chattel mortgage (R. 36); the Oregon criminal statute prevented resale except by written consent of petitioner (§23-524, Or. Comp. L. Ann.); petitioner did not give such consent until after this action was commenced (R. 40, 123-124, 468); the number of hop dealers has become limited (R. 252, 447; No. 760 R. 288); ordinarily such dealers will not consider hops under chattel mortgage to, or purportedly rejected by, another dealer (R. 188, 461, 489).

Particularly since there was no available market, it was proper to measure the recovery by the balance of the price, which was the loss directly and naturally resulting in the ordinary course of events from the buyer's breach.[10]

---

9. On petition for rehearing before the Court of Appeals, Judge Pope thought "that a rehearing should be granted upon the question of the measure of damages" (R. 552). The petition was denied. Judges Mathews and Bone said (No. 760 R. 378): "It is our view that the conclusions of law reached by the trial court are correct."

10. §71-164, Or. Comp L. Ann.; *United States v. Swift & Co.*, 270 U.S. 124, 149; *Stevenson v. Puget Sound Vegetable Growers Ass'n.*, 172 Wash. 196, 199-200, 19 P. 2d 925, 926-927.

III

The measure of recovery allowed was proper under the contract.

One of the several contractual provisions relating to remedies for breach is a "liquidated damages" clause providing for a measure of damages in the difference between the contract price and the market value of the hops at the time and place of delivery (R. 13, 547). This is an ordinary measure allowed by law for breach of a sales contract, and the phrase "market value" used by the parties has its usual meaning. Because of the special circumstances noted above, these hops could not readily be resold (R. 40, 549-550). In the sense of the liquidated damages clause, the hops had a "market value" of zero. Even assuming that this is an action for damages for breach of contract, rather than to recover the purchase price of goods sold and delivered, the measure of damages allowed by the court was proper.

Any other interpretation of the clause would, upon the facts here, make it unenforceable as requiring a forfeiture. " 'Just compensation for the injuries sustained is the principle at which the law aims, and the parties will not be permitted by express stipulation, to set this principle aside.' " *Electrical Products Corp. v. Ziegler Drug Stores, Inc.*, 141 Or. 117, 125, 10 P. 2d 910, 15 P. 2d 1078, 1080. The absence of market value should "not mean that the offender shall go quit of liability alto-

gether." Cf. *Sinclair Rfg. Co. v. Jenkins Co.*, 289 U.S. 689, 697.

The petition (pp. 5-6) assumes a conflict between the decision of the Court of Appeals and the first opinion in *Daniels v. Morris*, 65 Or. 289, 130 Pac. 397. The Court of Appeals distinguished that case upon the facts (R. 550). In addition, the opinion on rehearing in *Daniels v. Morris*, 65 Or. 298, 132 Pac. 958, expressly recognized that the hop grower could have kept "the property on hand subject to the order of the buyer, after making tender thereof, and maintain an action for the balance of the purchase price." Such are the facts here (R. 38-39, 40-41).

In a later hop case (*Wigan v. La Follett*, 84 Or. 488, 165 Pac. 579) the contract contained a similar "liquidated damages" clause (84 Or. at 491-492). In that case also, the hops could not readily be resold (84 Or. at 506). The measure of damages for which the defendant grower counterclaimed, and which was allowed, was not the difference between contract price and market value on October 31, as provided in the "liquidated damages" clause, but rather the difference between the contract price and the proceeds of a resale in December (84 Or. at 493-494, 506). The measure of damages allowed, and not provided for in the liquidated damages clause, was approved by the court (84 Or. at 505-506).

CONCLUSION

The decision below turns upon the particular facts of the case and presents no question calling for further review by this Court. There is no conflict of decisions. The petition should therefore be denied.

Respectfully submitted,

ROY F. SHIELDS,

RANDALL B. KESTER,

WILLIAM E. DOUGHERTY,

Counsel for Respondent.

June, 1951

APPENDIX "A"

(All italics have been added.)

Sec. 2-218, Or. Comp. L. Ann.:

"For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret."

Sec. 2-219, Or. Comp L. Ann.:

"The terms of a writing are presumed to have been used in their primary and general acceptation, but evidence is nevertheless admissible that they have a technical, local, or otherwise peculiar signification, and were so used and understood in the particular instance, in which case the agreement shall be construed accordingly."

Sec. 23-524, Or. Comp. L. Ann.:

"*If any bailee,* with or without hire, *including every mortgagor of personal property* having possession of property mortgaged, or any purchaser or lessee of personal property, obtaining the possession thereof under a written or printed contract of conditional sale, providing that title thereto shall not vest in the purchaser until the unpaid balance of the purchase price is wholly paid for, and before same is wholly paid for, shall embezzle or wrongfully convert to his own use, or shall secrete or conceal, with intent to convert to his own use, or *shall* injure, destroy, *sell,* give away, remove from the county where

situated when obtained, *without the written consent of such bailor or vendor,* or shall fail, neglect, or refuse to deliver, keep, or account for, according to the nature of his trust, any money or property of another delivered or intrusted to his care, control, or use, and which may be subject of larceny, *such bailee, upon conviction thereof, shall be deemed guilty of larceny* and punished accordingly; * * *"

Sec. 71-112, Or. Comp. L. Ann.:

"Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, *and if the buyer purchases the goods relying thereon.* * * *"

Sec. 71-119, Or. Comp. L. Ann.:

"Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer: * * *

"Rule 2. Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of putting them in a deliverable state, the property does not pass until such thing be done. * * *

"Rule 5. If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or have reached the place agreed upon."

Sec. 71-163, Or. Comp. L. Ann.:

"(1) Where, under a contract to sell, or a sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods. * * *

"(3) Although the property in the goods has not passed, if they can not readily be resold for a reasonable price, and if the provisions of section 71-164(4) are not applicable, the seller may offer to deliver the goods to the buyer, and, if the buyer refuses to receive them, may notify the buyer that the goods are thereafter held by the seller as bailee for the buyer. Thereafter the seller may treat the goods as the buyer's and may maintain an action for the price."

Sec. 71-164, Or. Comp. L. Ann.:

"(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for nonacceptance.

"(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

"(3) Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times

when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept. * * *"

Sec. 72-103, Or. Comp. L. Ann.:

"The person to whom a tender is made shall at the time specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument or the amount or kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterwards."